No. 06-755

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

KATHLEEN WARREN,

Petitioner,

v.

VOLUSIA COUNTY FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether circuit conflict has been created by an Eleventh Circuit finding of no *prima facie* case of ADA discrimination for lack of reasonable accommodation based on circuit precedent consistent with that of other circuits or because the court has not addressed an ADA issue on which other circuits have ruled.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption. Respondent is a governmental entity. There are no corporate interests.

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UNITED STATES CODE

42 U.S.C. §12112 1

UNITED STATES SUPREME COURT RULES

Sup. Ct. R. 10 3

STATUTORY PROVISIONS INVOLVED

Title 42, United States Code Annotated, Section 12112 (2006), Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Petitioner, Kathleen Warren, seeks review of an Eleventh Circuit decision [App. 1a-9a.] affirming a judgment as a matter of law [App. 10a-33a.] which found that Respondent, County of Volusia, Florida, had not discriminated against her under the Americans with Disabilities Act, (ADA) 42 U.S.C. §12112(a). The pertinent facts are set forth in the Eleventh Circuit opinion and the district court order. They briefly are recounted here.

Petitioner became employed as a corrections officer for respondent in 1989. App. 11a. On September 27, 1993, petitioner sustained an on-the-job injury to one of her wrists. *Id.* Petitioner briefly returned to work, but then went out on leave based on doctor's notes. *Id.* In addition to her on-the-job injury, petitioner also suffered from rheumatoid arthritis, a condition which pre-existed her employment and worsened over time. *Id.* Although petitioner remained as an inactive County employee for years after her injury – on various leave statuses – she did not

actively work for the County (as a corrections officer or otherwise) after October, 1993. *Id.*

Petitioner received workers' compensation benefits for a brief period, followed by short- and long-term disability benefits. *Id.* Petitioner's workers' compensation case against the County was settled in 1997. *Id.* Petitioner testified at trial that she was completely disabled from all types of work as of late 1999, but that she was able to work prior to that time and that the County discriminated against her by not accommodating her disability. *Id.*

Reviewing trial evidence most favorably to petitioner, the Eleventh Circuit found she never requested an accommodation, either on her own or through a representative. App. 8a. Petitioner admitted that she personally never requested an accommodation. App. 8a. Petitioner claimed at trial that she requested an accommodation through her workers' compensation attorney who during settlement discussions had sought assistance only with "retraining." App. 3b. The Eleventh Circuit observed that a request for retraining is insufficient under the ADA because retraining is not a reasonable accommodation. App. 8a. The court stated that the ADA does not require the county to reassign petitioner to a position for which she is not qualified. *Id.*

Petitioner also claimed at trial that forms completed by treating doctors placed respondent on notice of her desire to return to work. These statements were made before she claimed that she was able to return to work and indicated merely a need for "retraining." App. 23a. None stated whether and when petitioner would be released to return to work even with restrictions. App. 25a.

Petitioner admitted that the physician was not acting as her representative. App. 8a.

SUMMARY OF ARGUMENT

Petitioner advances two faulty premises. First, petitioner vacuously asserts that though prior Eleventh Circuit cases holding that an ADA reasonable accommodation claim must show a request for a reasonable accommodation accord with those of other circuits, the application of that principle to the facts here created conflict by requiring perfection. Second, petitioner argues nonsensically that there is circuit conflict because the Eleventh Circuit thus far has not ruled whether an employer has an ADA obligation to engage in an interactive process to determine a reasonable accommodation for an employee. Neither contention merits review.

ARGUMENT

A principal use of certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals concerning the meaning of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.* The petition does not meet the high standard for review.

I. No circuit conflict has been created by an Eleventh Circuit finding that petitioner failed to establish *prima facie* ADA discrimination case because she did not show a request for reasonable accommodation.

To establish a *prima facie* ADA claim of discrimination, a claimant must show that she has a "disability" as defined by the ADA, that she is a "qualified individual" (able to perform the essential functions of the employment position that she holds or seeks with or without reasonable accommodation), and that the employer unlawfully discriminated against her because of the disability. *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1226 (11th Cir. 2005); *Dvorak v. Mostardi Platt Associates, Inc.*, 289 F.3d 479, 483 (7th Cir. 2002); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999); *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 580 (3d Cir. 1998); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 869-70 (2d Cir. 1998); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996); *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996); *Katz v. City Metal Co. Inc.*, 87 F.3d 26, 30 (1st Cir. 1996); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996); *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995); *White v. York International Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995).

A claimant asserting denial of reasonable accommodation must show that she requested one. *Cutrera v. Board of Supervisors of Louisiana State University*, 429 F.3d 108, 112 (5th Cir. 2005); *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 260-61 (1st Cir. 2001); *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1364 (11th Cir. 1999); *Gantt v. Wilson Sporting Goods, Co.*, 143 F.3d 1042, 1046-47 (6th

Cir. 1998); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996), *cert. denied*, 519 U.S. 1029 (1996). Petitioner does not dispute circuit agreement on the prerequisite. Surveying the circuits, petitioner concedes their holdings "can be reconciled with prior Eleventh Circuit cases but not with the decision herein." Pet. 10. Petitioner concludes however that "[i]n the previous [Eleventh Circuit] cases, the failure to specifically identify a reasonable accommodation was a failure of proof at trial and not an essential element of the trigger [of an interactive process regarding accommodation]." *Id.*

The Eleventh Circuit did not create a new standard for a request for reasonable accommodation. Its *de novo* record review found that petitioner never requested any accommodation, either on her own or through a representative. App. 8a. The court did not hold that a lawyer's request is invalid. It found that a retraining request was not one for a reasonable accommodation. "If an employee must be retrained in order to fulfill the job requirements, the employee is not 'qualified' under the ADA." App. 8a. (*citing Willis v. Conopco, Inc.*, 108 F.3d 282, 284 (11th Cir. 1997). The beaten decisional path followed by the court is that claimant must show that she can perform the essential functions of the job. *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795, 806 (1999); *Reed v. LePage Bakeries, Inc.*, 244 F.3d at 259; *Gaul v. Lucent Technologies*, 134 F.3d at 580; *Monette v. Electronic Data Systems Corp.*, 90 F.3d at 1183-84; *White v. York International Corp.*, 45 F.3d at 361-62; *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996); *Tyndall v. National Educational Centers, Inc. of California*, 31 F.3d 209, 212-13 (4th Cir. 1994). Petitioner failed in her proof at trial.

II. No circuit conflict has been created by the absence of an Eleventh Circuit ruling that an employer is obliged by the ADA to engage in an interactive process.

Petitioner asserts Eleventh Circuit conflict with other circuits on whether an interactive process with the employee is mandatory following a request for accommodation. Petitioner states that "the Eleventh Circuit has never expressly held that the ADA requires an employer to engage in an interactive process with the employee to identify reasonable accommodations . . . " Pet. 5. Nor has the court ruled to the contrary. The Eleventh Circuit has not addressed this point. No Eleventh Circuit case, including this one, has required its decision of the issue. There is no conflict to resolve.

CONCLUSION

WHEREFORE, respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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